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**IN THE
COURT OF APPEALS OF INDIANA**

CARLOS RAMIREZ,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0608-CR-705
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause No. 49G01-0503-MR-31816

June 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Carlos Ramirez (“Ramirez”) appeals his conviction for Criminal Gang Activity, a Class D felony.¹ We affirm.

Issue

The sole issue raised is whether Ramirez’s conviction for criminal gang activity is fatally inconsistent with his acquittal for murder.

Facts and Procedural History

Ramirez is a member of a street gang known as Sureños 13, “Sur 13” for short. On February 26, 2005, several members of Sur 13, including Luis Boch (“Boch”), went to the Madame Walker Theatre in Indianapolis for a dance. Three members of a rival gang were also present, one of whom was Jose Espinoza. Boch and Espinoza had been in a prior altercation. Sur 13 members chased the three men. Espinoza ran in one direction; his two companions ran in another. A group of seven to eleven males caught Espinoza, grabbed him, threw him to the ground, and took turns beating him in the median of Dr. Martin Luther King Jr. Street.

At some point, Ramirez went to a nearby vehicle, retrieved a shotgun, and walked toward Espinoza. The weapon discharged. Additional shots were fired. Espinoza was hit by two or three shots, causing injuries to the head, groin, and wrist. He died at the scene from a close range shot to the head.

Police arrived and learned that Sur 13 gang members were congregating at a residence on Southeastern Avenue. Officers found approximately sixteen males at that address. They

also discovered the shotgun used in the incident under a car in the back yard. When police spoke to Ramirez, he stated in Spanish, “Take me to jail.” (Tr. 183.) Ramirez was arrested, and the State charged him with criminal gang activity and with murder, a felony.²

At Ramirez’s jury trial, Boch testified that Ramirez approached Espinosa, asked him something, and shot him multiple times. In his defense, Ramirez explained that he lifted the shotgun and “it fired . . .” (Tr. 495.) He “saw movement as if [Espinosa] had fallen on his knees.” (Tr. 497.) According to Ramirez, he dropped the weapon and ran to the vehicle where another person drove him away. A firearms expert concluded that the bottom of Espinoza’s sweatshirt had been shot from a distance of more than nine feet away. No blood was found on any articles of Ramirez’s clothing.

The jury found Ramirez guilty of criminal gang activity and not guilty of murder. This appeal followed.

Discussion and Decision

Ramirez contends that his conviction for criminal gang activity is fatally inconsistent with his acquittal for murder. When this Court reviews a claim of inconsistent jury verdicts, we take corrective action only when the verdicts are extremely contradictory and irreconcilable. Lampitok v. State, 817 N.E.2d 630, 641 (Ind. Ct. App. 2004), reh’g denied, trans. denied. Verdicts that initially may seem inconsistent on some level are not legally inconsistent if they can be explained by the jury’s exercise of its power to assign the proper weight to and either accept or reject certain pieces of evidence. May v. State, 810 N.E.2d

¹ Ind. Code § 35-45-9-3.

² Ind. Code § 35-42-1-1.

741, 743 (Ind. Ct. App. 2004). “Thus, an acquittal on one count will not result in reversal of a conviction on a similar or related count, because the former will generally have at least one element (legal or factual) not required for the latter.” Id. at 744 (quotations omitted). In that instance, the jury is presumed to have doubted the weight or credibility of the evidence presented in support of this distinguishing element. Id.

Here, Ramirez argues that the murder count operates “almost, like a less-included offense.” Appellant’s Br. at 9. He likens his case to Owsley v. State, 769 N.E.2d 181 (Ind. Ct. App. 2002), reh’g denied, trans. denied. In Owsley, the State charged the defendant with conspiracy to commit dealing in cocaine, possession of cocaine, and dealing in cocaine. The only overt act supporting the conspiracy charge was the act of providing cocaine to a named person. Id. at 182-83. The jury acquitted the defendant of possession of cocaine and dealing in cocaine, but found him guilty of conspiracy to commit dealing in cocaine. Id. at 183. On appeal, our Court questioned how one could have provided cocaine to another if he did not possess cocaine. Id. at 186. Because the acquittal on the possession charge logically negated the existence of a necessary element of the conspiracy charge, i.e., the overt act of providing cocaine, we vacated the conspiracy conviction and remanded for further proceedings. Id. at 186-188.

We agree with the reasoning in Owsley, but it does not control this case. To convict Ramirez of murder as charged, the State was required to prove beyond a reasonable doubt that Ramirez knowingly killed Espinosa by shooting a shotgun “at and against” Espinoza, “thereby inflicting mortal injuries . . . causing Jose Espinosa to die.” App. at 29; see I.C. §

35-42-1-1. To convict Ramirez of the criminal gang activity as charged, the State was required to prove beyond a reasonable doubt that, while a member of “the SURANOS 13,” Ramirez “did knowingly actively participate in criminal gang activity,” specifically, that he shot a shotgun “at and against the person of Jose Ramirez, believing Jose Espinoza to be a member of a rival gang, . . .” App. at 29; See I.C. 35-45-9-3.³ Thus, to convict of criminal gang activity, Ramirez could be linked to the murder through his criminal gang activity without having committed the murder itself. See Jackson v. State, 634 N.E.2d 532, 534-35 (Ind. Ct. App. 1994) (stating that it was not necessary for the State to prove that the defendant himself administered a beating or committed a felony to prove that he actively participated in the group).

Here, the record shows that Espinosa was wounded in the head, groin, and wrist, by two or three shots. He died from a close-range shot to the head. Another shot that went through his sweatshirt came from a distance greater than nine feet. Although Boch testified that it was Ramirez who killed Espinosa, the jury was free to discredit Boch’s version of events.

Ramirez admits that he was a member of Sur 13 and that he believed Espinosa to be a member of a rival gang. But Ramirez testified that he retrieved the shotgun, that it fired from a distance away, and that he observed Espinosa move “as if he had fallen on his knees.” (Tr. 497.) Ramirez also testified that he dropped the shotgun after it fired and that he was driven away. No blood was found on Ramirez’s clothing.

³ Regrettably, Ramirez did not provide us with preliminary or final instructions setting forth the elements of the crimes as they were outlined for the jury.

On this record, the jury could have concluded that multiple individuals fired shots from multiple distances and that, as such, the State did not prove beyond a reasonable doubt that it was Ramirez who killed Espinosa. Because the conviction for criminal gang activity did not require the State to show that Ramirez committed the murder, we conclude that the jury could consistently convict for criminal gang activity and acquit for murder.

Affirmed.

SHARPNACK, J., and MAY, J., concur.